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No. 93-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

WILLIAM DUNN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

DONALD FRANCIS DONOVAN
Counsel of Record
ANNE E. COHEN
JONATHAN E. RICHMAN
SANDRA L. COBDEN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000
Counsel for Petitioner Owens-Corning Fiberglas Corporation

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Respondent's ("plaintiff's") opposition to petitioner Owens-Corning Fiberglas Corporation's ("Owens-Corning's") petition misrepresents the record and ignores the real reasons why this Court's review is both necessary and appropriate. Owens-Corning has presented sufficient evidence to support its due-process arguments, and the Court should not wait until the asbestos litigation crisis becomes even worse before deciding to intervene.[1]

I.

The Record Suffices to Permit Review.

As the five *in banc* dissenters concluded, the record in this case more than suffices to preserve the important constitutional questions presented. [Pet. at 57a.] Contrary to plaintiff's claim, the district court record contains evidence of other punitive-damages awards against Owens-Corning: the company submitted a sworn affidavit and numerous exhibits (including copies of judgments, transcript excerpts and other public records) showing 11 other awards totalling $19,950,000 as of mid-1991. [JA 1940-2110; *see also* Pet. at 134a-140a (compiling awards).][2] Those judgments are public facts that a court may judicially notice, *see* Fed. R. Evid. 201, and the Third Circuit majority and dissenters discussed those other awards in their opinions [Pet. at 33a-34a, 57a].

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1. Owens-Corning will not respond to plaintiff's recitation [at 2-5] of the evidence allegedly supporting punitive damages, because the petition does not raise conduct-based issues.

2. This case thus is quite different from *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-81 (2d Cir.), *cert. dismissed*, 497 U.S. 1057 (1990), where the defendant could show only two prior awards totalling $375,000.

The district court record also contains information about Owens-Corning's total revenues from asbestos-containing Kaylo (approximately $140 million). [JA 2120; Pet. at 50a.] The record therefore establishes that Owens-Corning's projected $1 billion uninsured liability for claims through 1999 is approximately *seven times* the company's total Kaylo *sales* -- regardless of whether a reviewing court also considers that the uninsured liability is *125 to 700 times* the company's total Kaylo *profits* (approximately $1.4 to $7.7 million) [Pet. at 35a n.24].

Plaintiff's argument [at 6, 11] that Owens-Corning should have submitted evidence of other punitive-damages awards to the jury, rather than to the district court or the Third Circuit, ignores that such an approach,

> although valid in concept, is unrealistic in practice. It requires a defendant to advise the jury that prior juries hearing the same evidence have already found that the defendant's conduct was so egregious as to warrant punitive damages. To require a defendant to present such prejudicial evidence to a jury as its only alternative is to place it between Scylla and Charybdis.

Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056, *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989); *accord Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) ("unrealistic" to expect jury to deny or reduce punitive damages based on other awards, "even assuming the defendant would want such a charge, and still more unrealistic to expect that

the jury would follow such an instruction").[3] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991), itself upheld a punitive-damages scheme providing for *post*-verdict consideration of "the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." And "[f]ollowing the dictates of *Haslip*," the West Virginia Supreme Court revamped that state's punitive-damages law to require the trial court -- not the jury -- to consider "[a]ny other civil sanctions against the same defendant, based on the same conduct." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 908-09 (1991).

Restricting a reviewing court's substantive due-process scrutiny to the information available at the time of trial also interferes with that court's ability to make an independent assessment of whether punitive damages are in fact still needed to punish and deter (and if so, in what amount). In mass-tort contexts such as the asbestos litigation, additional punitive-damages awards may be entered on a weekly or monthly basis. If the reviewing court may consider only what was (or could have been) presented to the jury, it never will be able to evaluate the overall situation.

This case illustrates the problem. When Owens-Corning filed its post-trial motions in mid-1991, 12 punitive-damages judgments (including this one) had been entered against it. As of now,

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3. The district court's bifurcation of the compensatory and punitive phases of the trial did not alleviate the problem, as plaintiff suggests [at 15 n.6]. Even if bifurcating the determinations of *liability* for punitive damages and *amount* of punitive damages might conceivably enable a defendant to inform a jury of other punitive-damages awards, merely bifurcating the compensatory-damages phase from the punitive-damages phase will not reduce the extreme prejudice noted in *Juzwin* and *Roginsky*.

there are at least 29 such judgments. [Pet. at 134a-140a.][4] If this Court cannot consider all 29 judgments in evaluating Owens-Corning's due-process arguments, that number might well be much higher by the time the Court reviews a certiorari petition from the 29th judgment. The time lag inherent in the appellate process thus ensures that the due-process violations will continue if the Court cannot assess the ongoing need for punitive damages based on the best available public information.

II.

Additional Punitive Damages Are Not Needed to Punish or Deter.

Plaintiff nowhere refutes Owens-Corning's *factual* showing about the scope and impact of the asbestos litigation. Instead, plaintiff claims [at 13] that Owens-Corning should not be "'relieved of liability for punitive damages merely because . . . [it] may have managed to seriously injure a large number of persons'" (quoting *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910, 913 (1982), *rev'd*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983)). This argument misses the point. The number of persons allegedly affected by Owens-Corning's conduct is the very reason why the company's liability for *compensatory* damages is so enormous. Where, as here, those *compensatory* costs themselves are high enough to satisfy the goals of punishment and deterrence, additional

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4. Yet another judgment, for $1 million in punitive damages, recently was entered. *See $3 Million West Virginia Verdict*, Mealey's Litig. Reports - Asbestos 11 (Oct. 1, 1993). At least one other verdict, for $100,000, has not yet been reduced to judgment. *See $100,000 in Punitives Returned Against OCF*, *id.* at 12.

punitive damages are unnecessary and excessive -- and therefore violate due process.

Plaintiff's (and the Third Circuit majority's) focus on the fact that, *as of 1991*, Owens-Corning had not yet actually paid any punitive-damages *judgments* is too narrow: it unjustifiably ignores (*i*) the very substantial amounts of punitive damages on appeal or otherwise unresolved (currently more than $44 million) [Pet. at 17 n.10], (*ii*) the amounts in excess of compensatory damages that Owens-Corning was required to pay to *settle* judgments with punitive-damages components [JA 1945-48], (*iii*) the approximately $8.5 million in punitive damages that Owens-Corning has paid to date, including *judgments* of $5,380,000 paid in 1993 [Pet. at 17 n.10], and (*iv*) the need to consider prior *and* future punitive-damages awards, *see* Restatement (Second) of Torts § 908, comment e.

But most importantly, plaintiff and the Third Circuit majority ignore the approximately $1 billion in uninsured *compensatory* costs that Owens-Corning expects to pay for claims through 1999. Because this uninsured liability more than suffices to punish and deter, it cannot be eliminated from an analysis of how much punishment and deterrence already is being inflicted.

Plaintiff also misrepresents Owens-Corning's financial condition. Contrary to his claim [at 7], Owens-Corning's "current financial statements" do *not* say the asbestos litigation's "additional uninsured costs . . . will not have a materially adverse effect on the Company's financial position." The quoted statement is three years old. It comes from Owens-Corning's 1990 Annual Report [Pet. at 35a], which predated the company's decision to charge an additional $800 million against 1991 earnings to cover the *uninsured* costs of asbestos claims through 1999 [*id.* at 34a n.23]. (That $800

million charge, together with previous charges, created an unfunded reserve of $955 million to cover uninsured asbestos costs.)

Plaintiff's discussion of Owens-Corning's remaining insurance [at 7-8] is equally misleading. The cited $1.26 billion figure not only dates from *1990* but also includes as much as $230 million in deductibles. By the end of 1992, however, Owens-Corning had only about $675 million in unexhausted product-liability insurance (excluding deductibles), and only about $400 million of that amount had not yet been committed. [Pet. at 9.][5]

III.

This Court Should Act Now.

Plaintiff has not offered any legitimate reason for this Court to defer consideration of the issues raised in Owens-Corning's petition.

First, allowing the issues to "ventilate" [Opp. at 18] in light of *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), would not serve any purpose. *TXO* did not address the unique problems of mass-tort litigation (much less asbestos cases), and it is relevant here only to the extent it reaffirmed *Haslip*'s basic holding that the Due Process Clause imposes substan-

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5. Owens-Corning's most recent Form 10-Q Report, filed on November 15, 1993 with the Securities and Exchange Commission, states that the company had only about $431 million in unexhausted product-liability insurance as of September 30, 1993. The Form 10-Q also states that Owens-Corning received 11,200 new asbestos personal-injury claims in the third quarter of 1993.

tive limits on punitive damages.[6] Further "ventilation" is unnecessary.

Second, plaintiff's claim [at 1] that the Courts of Appeals have not reached conflicting decisions on the issues raised here not only overlooks numerous dissents and other expressions of misgivings *within* appellate courts; it also demonstrates why this Court's intervention is so necessary. As Owens-Corning showed in its petition, the lower courts have proven unable to deal with the problems posed by mass-tort claims pending in hundreds of federal and state forums throughout the country. The Third Circuit majority itself specifically declined to tackle these questions "in light of the Supreme Court's studied silence on the policy issue" [Pet. at 32a], and other courts have expressed similar reluctance or powerlessness, *see* Pet. at 25-29; *see also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1019 (6th Cir. 1993) (Wellford, J., concurring) ("Were I writing on a clean slate in this court, I would adopt the language of then Chief Judge Charles Clark of the Fifth Circuit": "'The problems we face in this litigation are ones of national public policy. . . . Since Congress has not provided a solution, the Supreme Court of the United States should have been asked to provide one.'") (quoting *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 417 (5th Cir.) (*en banc*) (Clark, C.J., dissenting), *cert. denied*, 478 U.S. 1022 (1986)); *Edwards v. Armstrong World*

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6. The denial of certiorari in *Owens-Corning Fiberglas Corp. v. Adams*, 113 S. Ct. 3035 (1993), which had been held in abeyance pending disposition of *TXO*, thus has no particular meaning. Moreover, "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quotations omitted). In addition, no West Virginia appellate court had issued an opinion that could be reviewed in *Adams*. Here, in contrast, five members of the *in banc* Third Circuit dissented from the majority's ruling and agreed with Owens-Corning's due-process arguments.

Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) (echoing prior "'misgivings' that no due process or legislative remedy is available in this circuit"). This Court is the only one that can exercise nationwide jurisdiction and resolve the issues on anything other than a parochial or piecemeal basis. The lower courts are waiting for guidance. They should not be forced to wait any longer.

Third, judicial rather than legislative action is entirely appropriate. This case involves due-process questions and common-law damages issues, which are the province of the judiciary. As the five *in banc* dissenters stated below, "[m]istakes created by courts can be corrected by courts without engaging in judicial activism." [Pet. at 53a; *see also id.* at 27.]

Fourth, the various questions that plaintiff poses [at 15-17] should not deter review. The facts of the asbestos litigation (and of Owens-Corning's own situation) are so extreme that they go well beyond whatever due-process line the Court might draw or whatever rule might evolve over time. As plaintiff himself concedes [at 17], the Court did not (or could not) draw any "fixed" or "bright" due-process lines in *Haslip* and *TXO*, but the Court nevertheless did not refuse to review the important and difficult constitutional issues concerning punitive damages. The Court should not shrink from the present task, either.

Finally, plaintiff nowhere addresses Owens-Corning's showing that continued awards of punitive damages in asbestos litigation impede settlement efforts, congest the courts and threaten to exhaust resources needed to compensate future asbestos plaintiffs for their injuries. The longer this Court waits to consider the practical and constitutional implications of multiple punitive-damages awards, the more serious these problems will become --

for asbestos litigants, the judiciary and society at large. As the five Third Circuit *in banc* dissenters concluded, the continued imposition of punitive damages in these circumstances "serves no rational purpose." [Pet. at 66a (Weis, J., dissenting); *accord id.* at 67a (Becker, J., dissenting) (additional punitive damages are "so irrational as to offend the due process clause").]

CONCLUSION

For the reasons stated in the petition and in this reply, the Court should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

DONALD FRANCIS DONOVAN
(*Counsel of Record*)
ANNE E. COHEN
JONATHAN E. RICHMAN
SANDRA L. COBDEN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Petitioner
Owens-Corning Fiberglas Corporation

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